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In The

Supreme Court of the United States

October Term, 1978

No. 78-162

RGP, Inc., Travelers Insurance Company, and Otis Peterson,

Petitioners,

Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin, Darrell L., Harold, Harold M. and Luea Sorenson, Harold Jackson, State of Iowa, State Conservation Commission of the State of Iowa,

Respondents (Petitioners on Separate Petitions),

vs.

Omaha Indian Tribe and United States of America,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETER J. PETERS
233 Pearl Street
Council Bluffs, IA 51501
Counsel for Petitioners, RGP, Inc. and Otis Peterson

LOWELL C. KINDIG
300 Toy National Bank Building
Sioux City, IA 51101
Counsel for Petitioner, Travelers Insurance Co.

FRANCIS M. GREGORY, JR.
1666 K Street, N. W.
Washington, D. C. 20066
Counsel for Petitioners, RGP, Inc. and Otis Peterson

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINION BELOW AND JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit, *Omaha Indian Tribe with United States v. Wilson, et al.*, 575 F. 2d 620, is reprinted as Appendix A, pages A1 to A67. The judgment of the United States Court of Appeals for the Eighth Circuit was entered on April 11, 1978. A timely petition for rehearing, with suggestion that rehearing be in banc, was filed on April 25, 1978, and denied on May 2, 1978.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the Constitution of the United States provides, in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

25 U. S. C. § 194 provides:

> "*Trial of right of property; burden of proof*
>
> "In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

———o———

QUESTION PRESENTED FOR REVIEW

Whether 25 U. S. C. § 194 is unconstitutional on its face and as construed and applied by the United States Court of Appeals for the Eighth Circuit because it constitutes invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment to the Constitution.

———o———

STATEMENT OF THE CASE

The United States Court of Appeals for the Eighth Circuit, relying on 25 U. S. C. § 194, reversed the judgment in favor of petitioners[1] in the District Court for the Northern District of Iowa that had quieted title to 2,900 acres of Iowa farmland lying on the east side of the Missouri River in petitioners as against the Omaha Indian Tribe ("Tribe") and the United States as Trustee for the Tribe.[2]

On March 16, 1854, the Omaha Indian Tribe entered into a treaty with the United States. Thereafter, the Tribe selected land which included 2,900 acres of land physically located under the sky in the same longitude and latitude as the land involved in this case and at that time located in the then Territory of Nebraska; this land area was reserved by the Tribe as part of an agreement which ceded to the United States all other land west of the "centre of the main channel of said Missouri river. . . ." Act of March 16, 1854, Art. 1, 10 Stat. 1043.[3] At the time the Omaha Indian Reservation was established, the reserved land within the reservation was situated on the west (the Nebraska side) of the Missouri River. However, by 1923, the river had moved more than two miles to the west and the dispute revolves around the question of

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1 The term "petitioners" will be used to refer both to those parties named as petitioners herein and to the other defendants who are filing a separate petition for certiorari.

2 Throughout this litigation the United States acted in the capacity of trustee of the Tribe's reservation lands. While Indians have the right to use and occupancy of tribal lands, the United States holds the land as a trustee for the benefit of the Indians. *See Morrison v. Work*, 266 U. S. 481, 485 (1925). *See also Choate v. Trapp*, 224 U. S. 665, 678 (1912); *United States v. Rickert*, 188 U. S. 432, 442-43 (1903).

3 The factual background is taken from the opinion of the Eighth Circuit (Appendix A).

of proving events occurring over 100 years ago, the Court of Appeals vacated the district court's judgment and remanded the case with directions to enter judgment quieting title to the lands involved in the Omaha Indian Tribe and the United States as trustee.

—o—

REASONS FOR GRANTING THE WRIT AND ARGUMENT

The Important Constitutional Issue Presented by 25 U. S. C., Section 194 Should be Considered by This Court

On its face and as construed and applied by the United States Court of Appeals for the Eighth Circuit, 25 U. S. C. § 194 creates a racial distinction and presumption which constitutes invidious racial discrimination and a denial of Equal Protection of the laws in violation of the Due Process Clause of the Fifth Amendment.[6] The statute is unique; after extensive research, we have found no other federal statute which discriminates in favor of a member of one racial group over a member of a second racial group. Thus, the decision below presents an important constitutional question which had not been, but should be, settled by this Court, especially in light of the

6 Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment. *Regents of the University of California v. Bakke, supra,* Opinion of Mr. Justice Brennan, Slip Op. at 43-44; *Buckley v. Valeo,* 424 U. S. 1, 93 (per curiam), citing *Weinberger v. Weisenfeld,* 420 U. S. 636, 638 n. 2 (1975).

volume of pending and prospective litigation asserting claims by Indian tribes to immense areas of land in a great number of states.

The statute in question, which was critical to the Eighth Circuit's decision, provides:

> "*Trial of right of property; burden of proof*
>
> "In all trials about the right of property in which *an Indian* may be a party on one side, and *a white person* on the other, the burden of proof shall rest upon *the white person,* whenever *the Indian* shall make out a presumption of title in himself from the fact of previous possession or ownership." (Emphasis added.)

This incredible statute, which was enacted in 1834[7] and exhumed to enable the Eighth Circuit to reverse the district court's decision in this case,[8] on its face favors a member of one race ("an Indian") over a member of a second race ("a white person"). 25 U. S. C. § 194 is facially invalid. It is invidious discrimination, not only against a white person vis a vis Indian, but against a white person vis a vis a member of any other racial or ethnic group including Blacks, Asians, and Hispanics. This the Constitution forbids. *See Regents of the University of California v. Bakke,* Opinion of Mr. Justice Powell, announcing the Court's judgment, — U. S. —, Slip Op. at 37-38 (June 28, 1978). *See also, e. g., Loving*

7 Act of June 30, 1834, C. 161. § 22, 4 Stat. 733.

8 As pointed out by the Eighth Circuit (Slip Op. at 22, n. 19), only two other cases have even cited the statute in question, but neither case discussed the effect the provision should be given. *See United States v. Sands,* 94 F. 2d 156 (10th Cir. 1938); *Felix v. Patrick,* 36 F. 457 (C. C. D. Neb. 1888), *aff'd,* 145 U. S. 317 (1892).

v. Virginia, 388 U. S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U. S. 184, 196 (1964); *Brown v. Board of Education*, 347 U. S. 483 (1954).

Invidious racial discrimination is not the only constitutional infirmity embodied in this statute. The presumption created is unconstitutional because there is clearly no "rational connection" between the fact of previous ownership in 1867 and the presumed continuity of that ownership to 1977.[9] Such a "rational connection" is required to comply with due process, in civil as well as criminal cases.[10] Moreover, a statutory presumption cannot "deny a fair opportunity to repel it";[11] create "an invidious discrimination";[12] or be "conclusive of the rights of the party."[13] The Eighth Circuit's interpretation of § 194 does all of these prohibited things. It virtually renders the presumption irrebuttably conclusive denying petitioners a fair opportunity to repel it when the Court relieved the Tribe of any burden of proof,

9 "Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty, or property." (Emphasis supplied.) *Western & Atlantic R. R. Co. v. Henderson*, 279 U. S. 639, 642. This presumption was also contrary to various existing state law presumptions on the subject favoring petitioners.

10 *Tot v. United States*, 319 U. S. 463 (1943); *Western & Atlantic R. R. Co. v. Henderson, supra*, n. 1.

11 *Western & Atlantic R. R. Co. v. Henderson*, 279 U. S. at 642.

12 *Bandini Petroleum Co. v. Superior Ct.*, 284 U. S. 8, 19 (1931).

13 *Hawkins v. Bleakly*, 243 U. S. 210, 214 (1917). *See, also, Valdis v. Kline*, 412 U. S. 441 (1973); *Heiner v. Donnan*, 285 U. S. 312 (1932); *Schleisinger v. Wisconsin*, 270 U. S. 230 (1926).

acknowledged petitioner's burden as "onerous", and branded as "speculation" how the river moved to its 1923 position, which movement was determinative of the ultimate fact![14]

The Eighth Circuit attempted to preserve the constitutionality of 25 U. S. C. § 194 by pretending that the statute is worded differently than it is. This it cannot do.

"[A]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute. . . ." *Scales v. United States*, 367 U. S. 203 (1961); nor will the Court entertain "judicially rewriting" the statute, *Welsh v. United States*, 398 U. S. 333, 355 (1970), *Aptheker v. Secretary of State*, 378 U. S. 500, 515 (1964); or, "engraft upon it [the statute] an exception or other provision" to avoid an unconstitutional construction. *Crowell v. Benson*, 285 U. S. 22, 76-77 (1932) (dissenting opinion of Mr. Justice Brandeis) and cases cited therein. In view of the Eighth Circuit reliance on selected references to legislative history (App. A, pp. 21-23), we think the following admonition of the Supreme Court in *Gemsco, Inc. v. Walling*, 324 U. S. 244, 260 (1945) is also pertinent:

14 On page 65 of App. A: "We conclude on the basis of an *overall review of the record* that it is *entirely speculative* to determine when or how the thalweg moved to the position shown on the 1923 map." And at pages 69-70: "We recognize that to require the defendants to prove the cause of the river's movement occurring some 100 years after the event is indeed an *onerous burden*. This may seem to be an injustice when one considers that the defendants or their predecessors have possessed and continuously farmed the land without protest for nearly 40 years . . ." (Emphasis ours.)

> "the plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious basis for inference in every direction."

The statute as written creates a racial distinction which is "inherently suspect" and thus requires "the most exacting judicial examination." *See Regents of the University of California v. Bakke,* Opinion of Mr. Justice Powell, *supra,* at 21. The Eighth Circuit did not, however, subject 25 U. S. C. § 194 to such judicial scrutiny.

The Eighth Circuit's constitutional sanction of § 194 has suddenly, after more than 140 years, given it new life and approval. This will surely spawn litigation where none was possible before regardless of how meritorious the claim may be. American Indians whose ancestors and tribes possessed the entire country centuries ago can suddenly make out a case by proving they at one time owned, or merely roamed the land they now claim, thereby possessing it. Title to nearly every square inch of land in this country is subject to attack. The presumption which previously existed with record titles—under state law—is no longer effective for an Indian against a white person. A person's race may now be significant, and necessarily a matter of record, contrary to the spirit of *Shelley v. Kramer,* 334 U. S. 1 (1949).[15]

And, regardless of the patent irrationality of a presumption based upon race, consider the turmoil in other

15 Held restrictive covenant excluding from ownership or enjoyment of property violated 14th Amendment, and is none the less discriminating because courts will enforce them against any race including the white race.

areas of state, and federal law, which will result if this Court doesn't review the 8th Circuit's recognition of the statute as the supreme law of the land. The statute by its wording applies to "all trials", (*civil or criminal*), "about the right of property", (*personal or real, tangible or intangible*). The "state", and presumably "federal" governments, become the "white person." The presumption applies based upon "previous possession" alone regardless of how brief or how long previous. Commercial codes and transactions, motor vehicle titles, evidence codes, court room rules of procedure, existing valid presumptions, will all be pervaded by valid consideration of racial preference and discrimination where none existed before. The scope of § 194 will be left only to the imagination of an ingenious lawyer.

Ignoring throughout the opinion the plain language of the statute which prefers *one member* of the Indian race ("an Indian") over *one member* of the white race ("a white person"), the Court of Appeals construed 25 U. S. C. § 194 as granting "special treatment" to Indian tribes (and the United States as trustee) as against *all* of the remainder of the population, *i. e.,* non-Indians, whether individuals of whatever race, corporations, partnerships, trusts, associations, states, or indeed any other legal entity capable of owning property such as a Conservation Commission.[16] Starting from this erroneous

16 Such a construction of the term "white person," as used in another statute, was rejected in *United States v. Perryman,* 100 U. S. 235 (1880). That case involved a suit brought by a friendly Indian against the United States for the value of 23 head of beef cattle stolen from him by

(Continued on next page)

and unjustified *assumption* as to what 25 U. S. C. § 194 provides, the Eighth Circuit dealt only in passing in a footnote (App. A, p. 20) with the constitutionality of the statute by citing and relying on cases (discussed below) which are clearly inapposite and which involve legislative judgments that differ in substance and form from 25 U. S. C. § 194.

In sustaining the constitutionality of 25 U. S. C. § 194, the Eighth Circuit quoted (App. A, p. 20) out of context

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(Continued from previous page)

a Negro who was duly convicted of the theft. The relevant statutory language upon which the suit was brought (section 16 of Act of June 30, 1834, C. 161 § 16, 4 Stat. 733) provided that, when a white person was convicted of a crime committed in Indian country in which the property of a friendly Indian was taken or destroyed, the person so convicted should be sentenced to pay the friendly Indian double the value of the property, and if the offender was unable to pay at least the value, the government should pay the amount by which the offender's payment fell short. The Supreme Court held that the United States was not liable and stated:

> "It is contended, however, that the term 'white person,' as used here, means no more than 'not an Indian;' in other words, that the intention of Congress was to make the United States liable in the way indicated for all injuries to the property of friendly Indians by persons engaged in crime within the Indian territory who were not themselves Indians. Such, we think, is not the true construction of the statute."

The Court pointed out that the words "white person" were substituted for "any such citizen or other person" used in previous statutes and that, if Congress had wanted liability of the United States to rise by reason of theft by Negroes, it could have continued to use that former language. The same is true with respect to 25 U. S. C., § 194, *which was section 22 of the same Act of 1834 involved in the Perryman case.* If Congress had meant all non-Indians, human or otherwise, it would have so stated.

from this Court's decision in *Morton v. Mancari,* 417 U. S. 535, 554-55 (1974). That case upheld the constitutionality of a statute providing an employment preference in the Bureau of Indian Affairs for Indians of certain federally recognized tribes. *Mancari,* as well as the other cases cited by the Eighth Circuit in footnote 18, did not even involve preferences which were considered to be racial in character. Indeed, this Court made it clear in *Mancari* that the preference applied only to employment in the Indian service:

> "The preference does not cover any other Government agency or activity, and we need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations. Here, the preference is reasonably and directly related to a legitimate, nonracially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination." (417 U. S. at 554.)

Mr. Justice Powell reemphasized this ground of decision in *Bakke, supra,* at 35, n. 42:

> "In *Mancari,* we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs of the Department of the Interior (BIA). We observed in that case, however, that the legal status of BIA is *sui generis.* Id., at 554. Indeed, *we found that the preference was not racial at all,* but 'an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to groups . . . whose lives are governed by the BIA in a unique fashion'." (Emphasis added.)

In *Mancari* and the other cases cited by the Court of Appeals below,[17] the special treatment or preference was held to have been granted to Indians *not as a discrete racial group,* but as members of quasi-sovereign tribal entities. It is clear that such preferences were granted "to further the cause of Indian self-government." Here, the Eighth Circuit, after dismissing without comment the facial constitutional issue raised by 25 U. S. C. § 194 and after gratuitously rewriting the statute to state what it does not state (*i. e.,* that it provides "special treatment" to Indian *tribes* as against *all* others), did not even attempt to show that the "special treatment" of 25 U. S. C. § 194 was granted to quasi-sovereign tribal entities, as opposed to Indians as a discrete racial group, and certainly made no attempt to relate the preference to Indian self-government. Such an attempt would have been doomed to failure. 25 U. S. C. § 194 is invidious racial discrimination, nothing more and nothing less.

However well motivated Congress might have been 144 years ago, the following comments of Mr. Justice Powell in *Bakke* (Slip Op. at 25) could not be more relevant:

> "[T]he clock of our liberties, however, cannot be turned back to 1868 . . . It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others." (Emphasis added by Mr. Justice Powell; citations and footnote omitted.)

17 *Moe v. Confederated Salish & Kootenai Tribes,* 425 U. S. 463 (1976) (federally granted tax immunity); *Fisher v. District Court,* 424 U. S. 382 (1976) (tribal courts and their jurisdiction over tribal adoption); *McClanahan v. Arizona State Tax Comm.,* 411 U. S. 217 (1959) (tribal courts and their jurisdiction over reservation affairs); *Simmons v. Eagle Seelatsee,* 244 F. Supp. 808 (E. D. Wash. 1965), *aff'd,* 383 U. S. 209 (1966) (statutory definition of tribal membership, with resulting interest in trust estate).

25 U. S. C. § 194 has been utilized by the Eighth Circuit to deny petitioners equal protection of the law and to deprive them of property without due process of law, which they and their predecessors have farmed for over 40 years. Most assuredly, in view of the Eighth Circuit's decision, 25 U. S. C. § 194 will be advanced and relied upon by Indian tribes which are now asserting claims to immense areas of land in a large number of states. Thus, the grave constitutional issue presented by 25 U. S. C. § 194 as written and as construed and applied by the Eighth Circuit should not be avoided, but should be considered by the Court.

—o—

CONCLUSION

For the reasons stated, it is respectfully requested that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

PETER J. PETERS
LOWELL C. KINDIG

Counsel for Petitioners, RGP, Inc., Otis Peterson and Travelers Insurance Company

FRANCIS M. GREGORY, JR.

Of Counsel